No. 2234

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

VS.

PORTNEUF-MARSH VALLEY IRRIGATION COMPANY, A CORPORATION, DEFENDANTS IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT, DISTRICT OF IDAHO.

JAMES L. McCLEAR,

United States Attorney for the District of Idaho.

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STATEMENT OF FACTS.

This cause reaches this Court by writ of error presented by the United States. The lower court rendered judgment in favor of the defendants on demurrer to the complaint. The Government refused to further plead, and advances as error three different grounds, all of which go to the question of law as to whether or not the complaint states facts sufficient to constitute a cause of action.

The action was brought to recover from the defendants

$2461.30, the alleged value of 246.13 acres of land within the Fort Hall Indian Reservation in Idaho, appropriated by the defendant company in constructing an irrigation system for the irrigation of certain lands near the reservation.

On June 28th, 1908, the irrigation company made application to the Secretary of the Interior for a permit for such purposes which was thereafter duly approved by the Secretary in the usual manner in which such licenses are granted.

There is shown upon the face of the complaint the approval of the Secretary of the Interior, and that the company has constructed a reservoir and has impounded therein a large body of water to be used as stated in the irrigation of certain arid lands near the Fort Hall Indian Reservation, belonging to private parties.

The defendant in error, hereafter designated as the irrigation company, contends that it had the right to construct the reservoir, under authority granted by the Secretary of the Interior, pursuant to Act of Congress of March 3d, 1891, granting right of way for canals and reservoirs (Sec. 18 Act of March 3d, 1891, 26 Stat. 1101, 6 Fed. Stat. Annotated 508; Sec. 19 Act of March 3d, 1891, 26 Stat. 1102, 6 Fed. Stat. Annotated 509). The action was brought upon the theory that the Secretary of the Interior is without authority to grant such permit across the lands belonging to the Indians by virtue of a treaty hereinafter referred to, unless Congress by express statute has so authorized, and that the Act of March 3, 1891, does not bear out such construction, and that the acts of the irrigation company are without the sanction of law and the company should respond in damages for the reasonable value of the lands taken.

The Government maintains that the language used in the Act of March 3d, 1891, in Sec. 18 thereof, "that the right of way through the public lands and reservations of the

United States, is hereby granted" does not give the right of way for the purposes contended by the irrigation company across the Fort Hall Indian Reservation.

BRIEF, POINTS AND AUTHORITIES.

I.

That the Act of March 3d, 1891, has been superseded by a later act which by necessary implication repeals the Act of March 3d, 1891.

II.

That the lands in question were segregated and taken out of the category of public lands by grant and treaty of agreements with the Bannock and Shoshone Indians concluded on the 3d day of July, 1868 (Vol. 15 Stat. L. 673).

III.

Even though the Secretary had authority to grant the right of way under Act of March 3d, 1891, compensation should be allowed the Indians for the lands appropriated.

These propositions may be considered in the order named.

Proposition 1.

The repealing statute referred to was enacted by Congress May 11th, 1898, and is as follows:

> BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Act entitled "An Act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:
>
> "That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations

to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the center line of the tramroad, by any citizen, or association of citizens, of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses.

"Sec. 2. That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the Act entitled 'An Act to repeal timber culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

It will be observed that under the provisions of Section 2 of the Act of May 11th, 1898, reference is made to rights of way for canals or reservoirs for purposes of public nature, and said rights of way may be used for water transportation for domestic purposes or for the development of power as subsidiary to the main purpose of irrigation, and does not confer upon a private irrigation company, such as is now before the Court, the right of way across an Indian reservation, even with the approval of the Secretary of the Interior. Section 1 of the Act of May 11th, 1898, expressly states that the Secretary of the Interior is precluded from granting right of way within the limits of any park, forest, military or Indian reservation for canals, tramways or reservoirs. It is also noted that Sections 18, 19, 20 and 21 are from the Act of March 3, 1891: "An Act to repeal timber culture laws, and for other purposes," which Act is referred to in Section 2 of the Act of May 11, 1898.

It was contended by the defendant in the lower court that the Act of February 15, 1901 (37 Stat. 790), which grants the right of way over public lands, reservations and public parks for electric lines, canals, tunnels, etc., is explanatory of the word "reservations" used in the Act of March 3, 1891. The proviso under Act of February 15, 1901, clearly refutes any such interpretation and uncontrovertably shows that the permission granted by the Secretary therein to be of a temporary character and revocable at will, and which proviso is as follows:

"And provided further: That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor at his direction, and shall not be held to confer any right or easement or interest in, to or over any public land, reservation or park."

It is also significant that the Act of March 3, 1875, which gives the right of way through public lands to railroads, that Section 5 thereof especially exempts Indian reservations from the grant, namely: "That this Act shall not apply to any lands within the limits of any military park or Indian reservation, or other lands especially reserved from sale unless such right of way shall be provided for by treaty, stipulation, or by Act of Congress heretofore passed" (18 Stat. 483).

Proposition 2.

The treaty between the United States and the Bannock and Shoshone tribes of Indians, concluded on July 3, 1868, expressly confers upon said Indians the right to the absolute and undisturbed use and occupation of the lands included within the said reservation, and for other free tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them, and the United States solemnly agrees that no persons

except those therein designated and authorized therein to do so, and except such officers, agents and employes of the government as may be authorized to enter upon the Indian reservation in discharge of the duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article (being Article No. 2 of said treaty) for the use of said Indians, and henceforth, they will and do hereby relinquish all titles, claims or rights in and to any portion of the territory of the United States except such as is embraced within the limits aforesaid.

Article 6 of said treaty gives the right to any individual belonging to said tribes of Indians, the right to select 320 acres of land within the reservation of his tribe, which tract so selected, certified and recorded in the land book, shall cease to be held in common, but the same may be occupied and held to the exclusive possession of him or his family so long as he or his family may continue to cultivate it.

Article 6. "If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within the reservation of his tribe, not exceeding three hundred and twenty acres in extent, which tract so selected, certified and recorded in the 'land-book,' as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it. Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above described. For each tract of land so selected a certificate, containing a description thereof, and the name of

the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office subject to inspection, which said book shall be known as the 'Shoshone (eastern band) and Bannock land-book.' "

The President may at any time order a survey of these reservations, and when so surveyed Congress shall provide for protecting the rights of the Indian settlers in these improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and the descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof, as may be thought proper."

Article 11. "No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent, any individual member of the tribe of his right to any tract of land selected by him, as provided in Article 6 of this treaty."

It is conceded that the Secretary of the Interior is the custodian of the public lands, but, when withdrawn from entry and sale as are lands within an Indian reservation, and reserved to the exclusive use and benefit of the Indians for lands ceded to the Government, the Secretary can then only dispose of said lands as Congress may direct. That the Secretary of the Interior is merely an agent appointed by law to do certain acts and perform certain duties required by law and he has no power beyond those specified in the law which creates his office and defines his powers and duties. The treaty with the Fort Hall Indians gives them a vested right

in the lands so reserved, and any attempted transfer of any part of the lands secured by treaty, would be a gross breach of public faith, and the presumption is that Congress never intended to deprive them of the lands solemnly conveyed by treaty rights.

> Leavenworth Railroad Company v. United States, 92 U. S. 733; 23 L. Ed. 634.

The Court's attention is especially directed to the use of the language in the granting clause "That the right of way through the public lands and reservations of the United States is hereby granted, etc." It is noted that the reservations mentioned are in the possessive; that is, relate to reservations which belong to the United States such as military and park reservations, where the absolute and incontestable title remains in the United States, and was not intended by Congress to refer to lands held in trust by the United States for the Indians. Such an interpretation would be a breach of public faith towards a dependent and unlettered people to take from them their lands after a solemn and binding treaty agreement made long prior to the passage of the act in question. It is incongruous to say that an official of the land department can take from the grant 246.13 acres for the use of a private corporation to irrigate lands outside the limits of the reservation. If this reasoning is sound, the power and authority rests with the Secretary of the Interior to diminish the acreage of the reserve to such an extent as to defeat the purpose of the grant, and thus deprive each individual belonging to said tribes being the head of a family from selecting a tract within the reservation of his tribe not exceeding 320 acres in extent as provided in Article 6 of the treaty.

This court gave emphasis to the importance of the principles thus enumerated in the following pertinent language:

In the case of Winters vs. United States, 143 Fed. 748,

after quoting from Kinney on Irrigation, Section 124, the Courts say: "In the application of these principles to military reservations, see Wilcox v. Jackson, 13 Pet. 498, 513, 10 L. Ed. 264. In Leavenworth R. R. Co. v. United States, 92 U. S. 733, 742, 745, 747, 23 L. Ed. 634, the court, in discussing the question whether certain lands granted to the railroad company conveyed lands which had previously been reserved for the Indians, said:

> "As long ago as the Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. Ed. 25, this court said that the Indians are acknowledged to have the unquestionable right to the lands they occupy, until it shall be extinguished by a voluntary cession to the government; and recently, in United States v. Cook, 19 Wall. 591, 22 L. Ed. 210, that right was declared to be as sacred as the title of the United States to the fee. * * * With the ultimate fee vested in the United States, coupled with the exclusive privilege of buying that right, the Indians were safe against intrusion, if the government discharged its duty to them. * * * We are not without authority that the general words of this grant do not include an Indian reservation."
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> After quoting from Wilcox v. Jackson, supra, the court said that the rule therein announced "Applies with more force to Indian than to military reservations. The latter are the absolute property of the government. In the former other rights are vested. Congress cannot be supposed to grant them by a subsequent law general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose. * * * The treaty reserved them as much to one as to the other of the contracting parties. Both were interested therein and had title thereto. In one sense they were reserved to the Indians; but, in another and broader sense, to the United States, for the use of the Indians. Every tract set apart for special uses is reserved to the government, to enable it to enforce them." In United States v. Carpenter, 111 U.S. 347, 349, 4 Sup. Ct. 435, 436, 28 L. Ed. 451, where the court held that the location of land scrip upon lands reserved for

Indians under the provisions of a treaty with an Indian tribe, and the issue of a patent therefor, are void, Mr. Justice Field, in delivering the opinion of the court, said:

"It matters not whether the land had been surveyed or not, the treaty was notice that a part of the quarry would be retained by the government, and that the whole might be, for the use of the Indians. This purpose and the stipulation of the United States could not be defeated by the action of any officers of the Land Department."

In Missouri, etc. Ry. Co. v. Roberts, 152 U. S. 114, 118, 14 Sup. Ct. 496, 498, 38 L. Ed. 377, the court, in discussing the general question, said: "It has always been held that the occupancy of land set apart by statute or treaty with them (the Indians) for their use cannot be disturbed by claimants under other grants of the government not indicating its intention, either in express terms or by the uses to which the lands are to be applied, to change the possession of the lands. And the setting apart by statute or treaty with them of lands for their occupancy is held to be of itself a withdrawal of their character as public lands."

Where public lands were withdrawn from sale for the subsequent benefit of certain Indians the fact that the withdrawal was conditional upon the land being required for the purposes of the Indian treaty, and that the Indians were to have no rights in such lands until after legislation should invest them with legal title, did not destroy the effectiveness of the withdrawal.

United States vs. Grand Rapids & I. R. Co., 154 Fed. 136.

"The reservation clause employed in the grant in question has been attached to all railroad land grants since 1850. The words 'public lands' have been held to designate such land as is subject to sale or other disposition under the general laws, but not such as is reserved by competent author-

ity, for any purpose or in any manner, although no exception is made of it. Leavenworth, etc., R. R. Co. v. United States, 92 U. S. 733, 746, 749, 23 L. Ed. 634; Williams v. Baker, 17 Wall 144, 21 L. Ed. 561; Newhall v. Sanger, 92 U. S. 761, 763, 23 L. Ed. 769; No. Pacific R. R. Co. v. Musser-Sauntry Co., 168 U. S. 609, 18 Sup. Ct. 205, 42 L. Ed. 596; United States v. So. Pacific R. Co., 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091; Northern Lumber Co. v. O'Brien, 139 Fed. 614, 71 C. C. A. 598; Id., 27 Sup. Ct. 249, 204 U. S. 190, 51 L. Ed. 438.

The provision in the granting act for indemnity in lieu of lands sold or pre-empted does not indicate an intention to grant any but public lands. Leavenworth, etc. R. R. Co. v. United States, supra. The fact that the withdrawal was conditional upon the land being required for the purposes of the treaty, and that the Indians were to have no rights in them until after legislation should invest them with the legal title, does not destroy the effectiveness of the withdrawal. Wolcott v. Des Moines Co., 5 Wall. 681, 18 L. Ed. 689; Wolsey v. Chapman, 101 U. S. 755, 25 L. Ed. 915; Williams v. Baker, 17 Wall. 144, 21 L. Ed. 561; Homestead Co. v. Valley R. R., 17 Wall. 153, 21 L. Ed. 622; Wisconsin Central R. R. v. Forsythe, supra; Spencer v. McDougal, supra; No. Pacific R. R. Co. v. Musser-Sauntry Co., supra.

The construction put upon the grant by the Land Department, as not excepting lands reserved for Indian purposes, cannot legally prevail against a clearly correct legal interpretation. Wilcox v. McConnell, 13 Pet. 511, 10 L. Ed. 264; Wisconsin Central R. R. Co. v. Forsythe, 159 U. S. 46, 61, 15 Sup. Ct. 1020, 40 L. Ed. 71, and cases there cited. If the views above expressed are correct, it results that the lands in question were in contemplation of law reserved from the grant of June 3, 1856, and did not legally pass thereunder."

If withdrawn lands do not apply to railroad grants, then there is a much more cogent reason that Indian reservations are not included within the Act of March 3, 1891. Leavenworth L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. Ed. 634; Barton v. No. Pacific R. R. Co. 145 U. S. 535, 36 L. Ed. 806; No. Lumber Co. v. O'Brien, 204 U. S. 190, 51 L. Ed. 438; Minnesota v. Hitchcock, 185 U. S. 373, 46 L. Ed. 954; U. S. v. Oregon Central Military Road Co. 103 Fed. 554; Buttz v. No. Pacific R. R. Co. 119 U. S. 55, 30 L. Ed. 330; Mount Nebo Reservation, 13 L. D. 45; No. Pacific R. R. Co. v. Maclay, 26 L. D. 43.

We go further and say that whenever a tract of land shall have been once legally appropriated to any person, from that moment land thus appropriated becomes severed from the mass of the public lands, and that no subsequent law, proclamation or sale could be construed to embrace or operate upon it although no reservation were made of it. It applies with more force to Indian than to the military reservations. The latter are the absolute property of the Government. In Indian reservations other rights are vested. Congress cannot be supposed to grant them by subsequent law general in its terms. Specific language leaving no room for doubt as to legislative will is required for such a purpose. That land dedicated to the use of the Indians should, upon every principle of natural rights be carefully guarded by the Government and saved from a possible grant, is a principle which will command universal assent.

> Leavenworth R. R. Co. vs. United States, 92 U. S. 723, 23 L. Ed. 634.

It is not deemed that Section 13 of the Act of June 25, 1910, militates against the position taken by the Government, as the authority therein given is to reserve from location, entry, sale, allotment or other appropriations any lands within any Indian reservation valuable for power or reser-

voir sites, or which may be necessary for use in connection with any irrigation project heretofore or hereafter to be authorized by Congress, etc." This section confers upon the Secretary of the Interior, in his discretion, a right to reserve lands within Indian Reservations for irrigation companies recognized by Congress, but makes no mention of authority to grant rights of way for ditches and canals as provided under the Act of March 3, 1891, for its purposes are different in the respects enumerated.

It is noted that application for right of way in the instant case was approved by the Secretary of the Interior June 27th, 1908, and therefore the Act of June 25, 1910, above referred to would not be germane as the power thus conferred upon the Secretary is subsequent to the appropriation of the land by the irrigation company.

A treaty is the highest form of law and its provisions should not be abrogated unless Congress in its wisdom has deemed it expedient for the public good to do so. United States v. Carpenter, 111 U. S. 347, 28 L. Ed. 451; Spalding v. Chandler, 116 U. S. 404, 40 L. Ed. 473.

The Act of September 1, 1888 (25 Stat. 452), was a ratification of an agreement made with the Shoshone and Bannock Indians for the surrender and relinquishment to the United States of a portion of the Fort Hall Reservation in the territory of Idaho for the purpose of a townsite, and for a grant of right of way through said reservation to the Utah and Northern Railroad Company for other purposes. The consideration paid for the right of way for the railroad was $8.00 per acre. This agreement is referred to for the purpose of showing that there is no intention on the part of Congress to take from the Indians any of the lands within the reservation without proper authority so to do nor without just compensation.

The lower court's reasoning that the Department of Jus-

tice has no greater right than the Secretary of the Interior, is answered fully in the case of United States vs. Malle Lac Band, 229 U. S. 428, 57 L. Ed. 1299.

Third Proposition.

The number of acres granted by the United States to the Bannock and Shoshone Indians was limited by the terms of the treaty, and to hold that lands could be taken by the Secretary of the Interior, would be doing an injustice to the Indians and depriving them of the right guaranteed by the Constitution of the United States that private property cannot be taken for public use without just compensation, and a deprivation of an equal protection of the laws. In the well known case of Minnesota vs. Hitchcock, the court used the following language which bears upon the question of the right of compensation (185 U. S. 389, 46 L. Ed. 963):

"Whether this tract, which was known as the Red Lake Indian Reservation, was properly called a reservation, as the defendant contends, or unceded Indian country, as the plaintiff insists, is a matter of little moment. Confessedly, the fee of the land was in the United States, subject to a right of occupancy by the Indians. That fee the Government might convey, and whenever the Indian right of occupancy was terminated (if such termination was absolute and unconditional), the grantee of the fee would acquire a perfect and unburdened title and right of possession. At the same time the Indian's right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." Buttz vs. No. Pacific R. R. Co., 119 U. S. 55, 30 L. Ed. 330; Cherokee Nation vs. Southern Kansas R. R. Co., 135 U. S. 641, 34 L. Ed. 295; New York Indians vs. U. S., 170 U. S. 1, 42 L. Ed. 927; U. S. v. Mille Lac Band, 229 U. S. 498, 57 L. Ed. 1299.

The treaty with the Indians should be construed in a way that would do exact justice to the Indians, 175 U. S. 1, 44 L. Ed. 49, Jones vs. Meehan:

> "In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the same sense in which they would naturally be understood by the Indians."

> "The title to the strip of land in controversy, having been granted by the United States to the elder chief Moose Dung by the treaty itself, and having descended, upon his death, by the laws, customs, and usages of the tribe, to his eldest son and successor as chief, Moose Dung the younger, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor, or by Congress, or of the executive departments. The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty itself. Jones v. Meehan, 175 U. S. 1, 44 L. Ed. 49; Wilson v. Wall, 6 Wall. 83, 89, 18 L. Ed. 727, 729; Reichart v. Felps, 6 Wall. 160, 18 L. Ed. 849; Smith v.

Stevens, 10 Wall. 321, 327, 19 L. Ed. 933, 935; Holden v. Joy, 17 Wall, 211, 247, 21 L. Ed. 523, 535."

The lower court based its decision largely upon the case of Rio Verde Canal Co., 27 L. D. 422, opinion being rendered by Secretary Bliss, who overruled the case of Florida Mesa Ditch Co., 14 L. D. 265, and the decision of March 14, 1898, 26 L. D. 381. The reasoning of the Secretary is considered unsound, as it is said by him in the course of the opinion "The granting of the right of way over such territory is but the exercise of the right of eminent domain, which is not in violation with the treaty made with the Indians or of its obligations to reserve the lands for their sole use and benefit free from intrusion by others." If the Secretary is correct in his premise, then the element of compensation is lacking and the plaintiff in this case is entitled to recover the value of the lands thus appropriated. But is the Secretary exercising the power of eminent domain in granting right of way across lands reserved from sale or other disposition by the Government? The answer must be in the negative as the power of eminent domain guarantees the right of judicial inquiry before a court of one's peers, and is not exercised in a summary way. The legislature cannot fix the compensation or prescribe the rules for its computation. Lewis on Eminent Domain, Sec. 461.

Upon the other hand, if the Secretary is exercising the power of eminent domain, and has put the machinery in motion by permitting the irrigation company to appropriate the lands as set forth in the complaint, then there still remains the right of the plaintiff to compensation which must be determined judicially. The action instituted is for that purpose. Lewis on Eminent Domain, Sec. 461.

The Plaintiff in Error now adverts to another proposition, namely: Has the Government the right to recover damages if the Secretary of the Interior had no authority

to grant the permit for the construction of the reservoir site?

It will be conceded by the Defendant in Error, no doubt, that if the Secretary had no right to grant the permit, then the act was void and becomes functus officio, and no action upon the part of the Government will be required to cancel or revoke such permit. But the defendant in error, having already constructed the reservoir and impounded water therein, is liable and the plaintiff in error is entitled to compensation for the value of the lands unlawfully appropriated. Injunctive relief might have been obtained if the officers of the Government had been apprised in time of the commencement of construction upon the reservoir.

In law the unwarranted appropriation of land is equivalent to the taking of it and the defendant should be held to respond in damages to the Government, the custodian of the Indians, to the amount of the value of the land so taken. Angel, in his work on water courses, Section 465, says: "But there are numerous authorities sustaining the doctrine that a serious interruption to the common and necessary use of property may be equivalent to the taking of it, and that under the Constitutional provisions, it is not necessary that the land should be absolutely taken. Whenever there is actual physical invasion, compensation is due and the law then fixes the measure of that compensation to be the valuation of that part taken plus the damage to the remainder of the property resulting from such taking. *Louisville & Franklin Ry. Co. v. Brown*, 17 *B. Monroe* 763; *Hollister v. Union Co.*, 9 *Conn.* 436; *Sharp v. U. S.*, 191 *U. S.* 341.

It is conceded that the Government holds the lands in question in fee, but in trust for the Indians, and inasmuch as the Government is the proper party to institute the proceedings in behalf of the Indians, the compensation for the lands would be held by the Government in trust in lieu of the part of the lands so taken. In other words, the Indians

should receive compensation for their lands the same as a private individual should receive under like circumstances, under the principle that private property cannot be taken for public use without just compensation.

The trial Court erred in sustaining the demurrer of the defendant, and it is respectfully suggested that this Court should reverse the ruling, direct the trial court to try the case on its merits, and submit the question as to the value of the lands to a jury.

Respectfully submitted,

JAMES L. McCLEAR,
United States Attorney.